INDEX

Page

I. Opinions Below 1

II. Jurisdiction 2

III. Questions Presented 2

IV. Constitutional and Statutory Provisions Involved... 2

V. Statement of the Case 3

VI. Reasons for Granting the Writ 11

1. *The judgment and opinion of the Court of Appeals has been decided in a way in conflict with decisions of this court and with other circuit courts.* 11

2. *The decision below is in conflict with decisions of this Court concerning the admission of statements and acts of the co-conspirator before proof of a conspiracy.* 16

Prayer 17

Appendix A 18

Appendix B 23

Appendix C 25

CITATIONS

Cases:

Bannon & Mulkey v. U.S. (1895) 156 U.S. 464, 468 16

Brown v. U.S. (1893) 150 U.S. 93 .....13, 16

Fiswick v. U.S. (1946) 329 U.S. 211 .....13, 16

Glasser v. U.S. (1942) 315 U.S. 60, 74 .....13, 14, 16

Hitchman Coal & Coke Co. v. Mitchell (1917) 245 U.S. 229 13

Krulewitch v. U.S. (1929) 336 U.S. 440 .....13, 16
Logan v. U.S. (1892) 144 U.S. 263 .....13, 16
Taylor v. U.S. (C.A.D.C. 1958) 260 F.2d 737 12
Thompson v. U.S. (C.A. 5, 1955) 227 F.2d 671 16
U.S. v. Baker (C.A. 7, 1974) 499 F.2d 845 12
U.S. v. Cantone & Rosen (C.A. 2, 1970) 426 F.2d 902 12
U.S. v. Di Re (1947) 322 U.S. 581 .....12, 13
U.S. v. Maloney (C.A. 7, 1952) 200 F.2d 344.....12
Winchester & P. Mfg. Co. v. Creary (1885) 116 U.S. 161 16

Statutes and regulations:

Title 21 U.S.C. § 846 .....2, 3
28 U.S.C. 1254(1) 2

No.

In the Supreme Court of the United States

OCTOBER TERM, 1975

DONALD BROWN
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Donald Brown petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

I
OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is not reported. The judgment and sentence of the Trial Court (Appendix B) and the Order Overruling Motion for New Trial (Appendix C) are not reported.

II
JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1975, and Petition for Rehearing was denied October 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

III
QUESTIONS PRESENTED

The questions presented for review are:

1. Whether, under the facts of this case, the order and quality of proof adduced at trial is sufficient to justify a conviction under the standards of Due Process of Law and the rulings of this Court.

2. Whether, consistent with the standards of Due Process of Law and the rulings of this Court, mere presence will suffice to prove either the fact of a conspiracy or the participation therein.

IV
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution which provides "No person . . . (shall be) deprived of life, liberty or property without Due Process of Law . . . " Petitioner was convicted under the provisions of Title 21 U.S.C. § 846 which

provides:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

V
STATEMENT OF THE CASE

This matter involves a conviction, by a jury, for violation of Title 21 U.S.C. § 846. References herein to the testimony will be by Transcript and page number (TR. p.).

Donald Brown proceeded to jury trial based upon an indictment which charged that the Petitioner and one Bobby Jordan entered into a conspiracy to distribute amphetamines in violation of § 846, Title 21, of the United States Code. The allegations of the conspiracy are shown at pp. 1 and 2 of the Record.

The Government called five witnesses including the co-conspirator, Bobby Jordan. The Defense called two witnesses including the Defendant, Donald Brown.

The first witness for the Government was Mr. Fred Taylor who identified himself as a Tulsa police officer involved with narcotics investigations.

The testimony of this witness indicated that he was familiar with amphetamines and the use as to which they

were put. He testified that he knew Mr. Brown but nothing was stated with respect to the previous involvement of Mr. Brown or any other criminal activity with respect to Mr. Brown.

He also testified that he knew the Co-defendant, Bobby Jordan (TR. p. 7). He stated that he had purchased amphetamines from him (TR. p. 8).

The latter testimony was over the objection of the Defendant (TR. p. 8). The purchase was alleged to have been made on June 24, 1974. The witness testified that he had had further conversations with Bobby Jordan relating to the purchase of more amphetamines. He stated that these conversations were in June and were had subsequent to the previous purchase. He also testified (TR. p. 8) as to further discussions with Jordan as to drug sales. These conversations were alleged to have occurred in July and more specifically on July 17, 1974. He testified as to receiving a telephone call from Mr. Jordan on July 23 in which the discussion centered around the purchase of additional amphetamines. He testified that at the time of the conversation Jordan related that his supplier was a man "named Don" (TR. p. 11). The testimony continued and the witness related that arrangements were made for a meeting and delivery of the amphetamines and that July 24 an additional telephone call was received by Jordan and final arrangements were made

for a meeting. Another telephone call was received from Jordan on the same date which, according to the witness, was to confirm the meeting date and the availability of the moneys agreed upon.

The witness testified that he, together with Agent Buck, arrived at the pre-arranged meeting location at approximately 1:00 p.m. (TR. p. 16). He stated that shortly after their arrival Brown and Mr. Jordan arrived with Jordan driving the automobile (TR. p. 17). Upon Jordan and Brown's arrival, Jordan started toward the vehicle which Buck and Taylor occupied but before arriving Jordan had a brief conversation with Brown. At that time Brown drove away in the Jordan vehicle.

Mr. Taylor related that he displayed the cash to Jordan and then Jordan told him that the other individual believed the parties were narcotics officers and had left. All parties proceeded to 11th and Denver in Tulsa, Oklahoma, where the amphetamines were supposedly located. Upon arrival at that location the amphetamines were not present and Brown was not around. He stated that Jordan saw his car sitting at that location and advised that he, Jordan, would seek to complete the transaction. Thereupon Jordan left and returned later in the afternoon in a different car. At the time Jordan returned he apparently determined that the people with whom he was dealing were police officers and he was then arrested.

On cross-examination it was established that there was another party with Jordan upon his arrival the last time prior to his arrest. His name was Woodson (TR. p. 25). In addition, cross-examination elicited that Mr. Taylor never had any conversation with Donald Brown regarding any sales of any type of narcotics *and that the name "Brown" was never used* (TR. p. 30). The record further indicates that the last name "Brown" was used *only* after the individual Jordan was placed under arrest (TR. p. 31).

The next witness for the Government was William McDonald, also a Tulsa police officer. He testified that he was involved in the investigation relating to the Jordan transaction. He testified that he saw Brown on three occasions on the afternoon of the 24th. (His first testimony related to seeing Brown on certain streets and subsequently corrected the testimony to state that he saw him on other streets in Tulsa.) The first time, according to McDonald, that he saw the Defendant, Brown, was as a passenger in a late model Chevrolet driven by Jordan. He said he saw him the second time again as a passenger on another street in Tulsa and the third time he saw him he, Brown, was driving the automobile and pulling it into a parking lot at 10th and Denver Streets in Tulsa, Oklahoma.

The next witness was the Co-defendant, Bobby Jordan. Mr. Jordan testified that he was a drug user for

some period of time, and that he had been previously convicted of two felonies, having plead guilty to charges in Federal Court arising out of this transaction.

He testified that on June 24th he met with Fred Taylor, the previous Government witness, in Tulsa, Oklahoma, for the purpose of delivering 3,000 amphetamine tablets (TR. p. 51). Over objection he was allowed to testify that he had obtained those amphetamines from Donald Brown (TR. p. 52).

He further testified that during the months of June and July of 1974 he had a number of telephone conversations with Taylor. He testified that the substance of these conversations related to the sale of additional amphetamines. He testified that he mentioned the name "Don" as his supplier (TR. p. 53). He further testified that a transaction was finally agreed upon and that the sale was to take place at 11th and Denver Streets in Tulsa, Oklahoma, on July 24, 1974.

He testified that he came to the parking lot of the Safeway store and that Brown came in his (Brown's) car and they both then proceeded to the pre-arranged meeting place in Jordan's car (TR. p. 56). The pre-arranged meeting place was approximately one block away from the Safeway parking lot (TR. p. 57).

Jordan testified that as they pulled up to the meeting place Brown stated that the individuals they were

meeting were police and then left after he, Jordan, got out of the car. He testified that he examined the money at that point and then the parties went to the Safeway parking lot. He said that upon arrival at the Safeway parking lot his car was there and "Don" had departed. He stated that he then left the Safeway parking lot for the purpose of looking for "Don" (TR. p. 62). He was unable to locate him and returned to the Safeway lot driving a blue Corvette belonging to one Joe Woodson whereupon he was arrested.

On cross-examination he testified that he was hopeful that his cooperation and testimony would keep him out of jail (TR. p. 68). He testified that in May, June and July of 1974 his principal source of narcotics was a person in Oklahoma City (TR. p. 71). He also testified that his last return to the Safeway parking lot was for the purpose of stealing the money and the car in which it was contained (TR. p. 79).

The next witness was Mr. Zablocki who identified himself as an employee of the United States Department of Justice. He testified that Fred Taylor brought to him some tablets on June 24, 1974, and he performed a test on these tablets to determine their substance and as a result thereof, determined them to be amphetamines. He also testified that he interviewed and talked with Bobby Jordan and that he told Mr. Jordan that he would make the United States Attorney's Office aware

of the extent of his cooperation.

Thereupon the Government rested and motions interposed by the Defendant were overruled.

The Defense then called Karen Alvarez. She testified that she was dating Mr. Brown and that on the 24th of July, 1974, Brown was at her house during the morning hours. She testified further that Jordan had been there at the house about an hour prior to Brown's arrival. She testified that there was nothing in particular in the way of conversation between Brown and Jordan during the time they were together. She further stated that Jordan left and used Brown's car and was gone for approximately an hour. She then stated that she departed for a job interview at the Cognito Inn which was just across the street from the Safeway parking lot referred to in previous testimony (TR. p. 100). She traveled to that job interview at approximately noon but because of the fact that the restaurant was busy, she had to wait and called Donald Brown and advised him that she would not be able to return the car immediately. She stated that Donald Brown then called her and said that she was to leave the keys in the car and he would come to get the car himself (TR. p. 101).

Donald Brown testified in his own defense beginning at p. 108 of the record. He testified that on July 24, 1974, he went to the home of Karen Alvarez at approxi-

mately 10:00 a.m. The purpose for that trip was to lend his automobile to her so that she could go to her job interview. He stated that upon his arrival that Bobby Jordan was there (TR. p. 110).

He stated that he stayed there until approximately noon and that during that time Jordan left and returned. He stated that Jordan had said something about seeing a person interested in buying a car (TR. p. 111).

He stated that Karen Alvarez took his car to go on an interview at approximately noon and that the interview was at the Cognito Inn. He stated that she called him shortly thereafter and told him that she would be delayed.

He then testified that he went with Jordan to 10th and Denver to get his, Brown's, car (TR. p. 113). He said that he had talked with Karen Alvarez again and ascertained where the car was parked. He said that Jordan, during the trip to town, told him that he, Jordan, was going to steal some money from some people he had made plans to meet. He said that they arrived at the area and he told Jordan not to do what he, Jordan, had in mind (TR. p. 116). Brown further testified that Jordan told him to take his car and leave—which he did (TR. p. 117). He denied having any conversations with Jordan whatsoever about the sale of any amphetamines.

On cross-examination he testified that his second

automobile was not available because it had been loaned to his ex-wife. He also denied supplying Jordan with narcotics of any form (TR. p. 124). He also denied that he was in any way going to participate in any theft of money or car (TR. p. 127). At p. 130 and 131 he denied that he sold any drugs or supplied any drugs for Jordan or anyone else.

The Defense rested, motions were renewed and the case was submitted to the jury. The jury returned a verdict of guilty. The Court fixed a term of five years plus a fine of $15,000.00, plus special parole for two years to commence at the expiration of the five-year period. An appeal was duly docketed and perfected thereafter.

VI
REASONS FOR GRANTING THE WRIT

1. The judgment and opinion of the Court of Appeals has been decided in a way in conflict with decisions of this Court and with other circuit courts.

The allegations in the indictment were that the conspiracy took place between June 24, 1974, and July 24, 1974. The overt acts alleged were: (1) A conversation on June 24, 1974; (2) A second conversation on July 17, 1974; (3) A third conversation on July 23, 1974; and, (4) the presence of the Petitioner with the alleged Co-conspirator on July 24, 1974. The overt acts involving

the first two conversations were conversations by Jordan, the Co-conspirator, with a law enforcement officer. Brown was not involved. The third conversation alleged involved a reference to a "Don".

The evidence at trial indicated that an unknown person was a supplier for Jordan (TR. p. 71). No dealings were had with Brown by the undercover officers (TR. p. 30). Petitioner's name was not mentioned until after Jordan's arrest (TR. p. 31).

Thus the totality of the evidence was that Brown was present on July 24, 1974. It is well settled as a result of decisions of this Court, and other Courts, that mere casual association or presence is insufficient to convict for a criminal offense or to prove a conspiracy.

Under Due Process Standards the Courts do not allow a presumption to be drawn from meetings, presence, etc., *U.S. v. Di Re* (1947) 322 U.S. 581; *Taylor v. U.S.* (C.A.D.C. 1958) 260 F.2d 737; *U.S. v. Maloney* (C.A. 7, 1952) 200 F.2d 344; *U.S. v. Cantone & Rosen* (C.A. 2, 1970) 426 F.2d 902; and *U.S. v. Baker* (C.A. 7, 1974) 499 F.2d 845.

Additional conflicts with the decisions of this Court evolve from the testimony of the witness, Taylor, in which he related certain statements made by Jordan, the alleged Co-conspirator, and which were made after Jordan's arrest and clearly after any alleged conspiracy had

terminated. Thus, the testimony of the witness Taylor, wherein he used the name Brown and referred to and related statements made by Jordan (See, e.g. TR. p. 21, 23), was prejudicial. Taylor did not have Brown's name from Jordan until *after* the arrest. It is well settled that acts or declarations made after termination of a conspiracy are not admissible. *Logan v. U.S.* (1892) 144 U.S. 263; *Brown v. U.S.* (1893) 150 U.S. 93; *Krulewitch v. U.S.* (1929) 336 U.S. 440; *Fiswick v. U.S.* (1946) 329 U.S. 211. Furthermore, there must be proof aliunde that the accused was connected with the conspiracy when the statements are made out of the presence of the accused. *Glasser v. U.S.* (1942) 315 U.S. 60, 74. Apart from the post arrest and post-"conspiracy" statements of Jordan, all that the Government had was the mere presence of Brown on July 24, 1974. Under the facts of the meeting—in broad daylight, in a public area—the fact that Brown was present and the fact that Brown accompanied Jordan does not suffice to meet the Government's burden. *U.S. v. Di Re* (1947) 332 U.S. 581.

In summary, before the acts or statements of Jordan are admissible, it is necessary to show by *independent* evidence that there was a conspiracy between Jordan and Brown. *Hitchman Coal & Coke Co. v. Mitchell* (1917) 245 U.S. 229. Apart from mere presence the Government did not present independent evidence of the conspiracy.

Nor may the testimony of the Co-defendant, Jordan,

be considered sufficient to take the case out of the general rules above stated. The facts of this case are not dissimilar to the facts in *Glasser v. U.S.* (1942) 315 U.S. 60. Although, the *Glasser* case involved the aspect of the adequacy of the representation, which is not involved in the instant appeal; nevertheless, the quality and nature of the testimony offered against Glasser was factually similar to that offered against Brown in this case.

Glasser had red hair. Co-conspirators or accomplices testified in the case that a co-defendant made statements which implicated Glasser, and these statements were not not made in the presence of Glasser. The statements were to the effect that the co-defendant, Kretske, would give the money to "red" or the "red head." Other testimony indicated that the money would go to "red" or "Dan." See generally the testimony contained at pp. 73-75 of the Opinion.

The Government urged that the testimony was admissible because of the general rule that the declarations of one conspirator in furtherance of the object of the conspiracy are admissible against co-conspirators. The Court quickly pointed out, however, that these declarations are admissible only if there is proof aliunde that the individual against whom the evidence is admitted is connected with the conspiracy.

Glasser argued that independently of the statements

there was no proof connecting him with the conspiracy. The Court reviewed the testimony and found it to be rather meager. It was testimony that Glasser had apologized to one individual who was supposed to have his case "fixed." Glasser also was stated to have received gifts from this same individual. Another witness testified that Glasser and other accomplices and co-defendants had met on several occasions. Other testimony indicated that Glasser had not prosecuted certain individuals and had taken certain actions with respect to other cases.

Admittedly the decision was made on the basis that Glasser's attorney was in a conflict of interests situation. However, to arrive at this conclusion, the Court examined the quality of evidence against Glasser and noted that he was prejudiced by the admission of the evidence. It must follow that the evidence was not admissible and/or it was insufficient to merit the conviction—that is, proof aliunde of a conspiracy—otherwise the conflict of interest would have been considered to be harmless error.

It is therefore submitted that the Government, in this case, has failed to establish the fact of a conspiracy by independent evidence.

This Court had decided that the improper admission of an extrajudicial statement of a conspirator is reversible error. The admission of these post-conspiracy extrajudi-

cial statements is in conflict with the decisions of this Court. *Logan v. U.S.* (1892) 144 U.S. 263; *Brown v. U.S.* (1893) 150 U.S. 93; *Fiswick v. U.S.* (1946) 329 U.S. 211; and, *Krulewitch v. U.S.* (1929) 336 U.S. 440. In addition, the admission of these post-conspiracy matters into evidence is in conflict with the Fifth Circuit. *Thompson v. U.S.* (C.A. 5, 1955) 227 F.2d 671.

2. The decision below is in conflict with decisions of this Court concerning the admission of statements and acts of the co-conspirator before proof of a conspiracy.

As a prerequisite to admitting an extrajudicial statement or act of one co-conspirator against an alleged fellow conspirator, it must *first* be shown that a conspiracy exists. *Winchester & P. Mfg. Co. v. Creary* (1885) 116 U.S. 161; *Bannon & Mulkey v. U.S.* (1895) 156 U.S. 464, 468. Otherwise, heresay evidence would lift itself by its own bootstraps to the level of competent evidence. *Glasser v. U.S.* (1942) 315 U.S. 60, 75.

The prejudicial effect of not following this rule is seen in this case. Here the Government was allowed to put on evidence concerning past sales by Jordan which were *never* connected with Brown. In fact Jordan testified that he had a supplier from Oklahoma City. Officer Taylor continually implied that Brown's name was being used (TR. p. 21-23) when it was not, and further when,

in fact, Brown's identity only became known *after* the arrest of Jordan.

The jury was, therefore, exposed to a substantial amount of prejudicial evidence and for which Brown was never implicated. Then, merely, by showing Brown's presence the Government was able to obtain its conviction.

PRAYER

Petitioner respectfully prays that this Court grant Writ of Certiorari; and, upon hearing, reverse the judgments below and for such other relief that Petitioner may be allowed.

ANDREW T. DALTON, JR
2536 East 51st Street
Tulsa, Oklahoma 74105
Phone: 918 742-0068

APPENDIX A

SEPTEMBER TERM—OCTOBER 29, 1975

Before The Honorable John C. Pickett,
The Honorable Oliver Seth and
The Honorable Robert H. McWilliams, Circuit Judges

No. 75-1065

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DONALD BROWN,
Defendant-Appellant.

This matter comes on for consideration of the petition for rehearing filed by the appellant in the captioned cause.

Upon consideration whereof, it is ordered that the petition for rehearing is denied.

s/s HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk
U.S. Court of Appeals,
Tenth Circuit

By: s/s MARY A. SHERMAN
Deputy Clerk

NOT FOR ROUTINE PUBLICATION
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1065

UNITED STATES OF AMERICA,
Appellee,

v.

DONALD BROWN,
Appellant.

Appeal from the United States District Court
for the Northern District of Oklahoma (74-CR-104)

Submitted on Briefs.

Nathan G. Graham, United States Attorney, and
Ben F. Baker, Assistant United States Attorney,
Northern District of Oklahoma, for Appellee.

Andrew T. Dalton, Jr., Tulsa, Oklahoma, for Appellant.

Before PICKETT, SETH and McWILLIAMS,
Circuit Judges.

PICKETT, Circuit Judge.

The appellant, Donald Brown, was convicted on an indictment charging him and Bobby Jordan with conspiracy to violate 21 U.S.C. § 846. The indictment charges that from on or about June 24, 1974, to on or about July 24, 1974, Brown and Bobby Jordan conspired to distribute amphetamine tablets, a Schedule III controlled substance. Jordan pleaded guilty and testified for the prosecution.

Criminal conspiracy is ordinarily defined as an agreement between two or more persons to commit an unlawful act or acts and thereafter one or more of the conspirators takes some affirmative action to carry out the agreement.[1] United States v. Thomas, 468 F.2d 422 (10th Cir. 1972), cert. denied, 410 U.S. 935 (1973); Goldsmith v. Cheney, 447 F.2d 624 (10th Cir. 1971); Romontio v. United States, 400 F.2d 618 (1968), cert. dismissed, 402 U.S. 903 (1971); Carter v. United States, 333 F.2d 354 (10th Cir. 1964).

It is not necessary that the objects of the conspiracy be actually accomplished. All that is necessary is proof that the conspiracy exists and that there is some overt act by one or more of the conspirators to carry out the conspiracy. 16 Am. Jur.2d *Conspiracy* § 7; Braverman v. United States, 317 U.S. 49 (1942); Frohwerk v. United States, 249 U.S. 204 (1919); United States v. Thomas, *supra*; Goldsmith v. Cheney, *supra*; Jordan v. United States, 370 F.2d 126 (10th Cir. 1966), cert. denied, 386 U.S. 1033 (1967). From the record it is obvious that the relationship between Brown and Jordan was not a casual one. Jordan testified that Brown was one of his sources of supply for narcotics. It was shown that Jordan had previously sold some 3,000 amphetamine tablets to police officer Taylor on June 24, 1974. Thereafter, Jordan called Taylor about twice a week concerning the purchase of a

[1] Accordingly, the trial court instructed the jury as follows:

> A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. Thus a conspiracy is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to violate or disregard the law.

large quantity of amphetamine tablets. Jordan discussed this proposed sale with Brown, and then advised Taylor that the tablets were being furnished by a man named "Don" and only 150,000 were available. Definite arrangements were made for sale at that time. Jordan advised Taylor that he had the tablets and that he and another man would meet them at a designated place. It then developed that the price would be 10½c each for 150,000 tablets. A short time later Brown and Jordan came to the place where the transaction was to be consummated. When they arrived Brown saw Taylor and told Jordan that the men were "cops" and hurriedly drove away after Jordan had jumped from the car. Jordan told Taylor that Brown then had 150,000 tablets in the trunk of the car which were intended to be delivered to Taylor. After Brown left, Jordan continued in his attempt to obtain the tablets but was unable to do so before his arrest. At that time the necessary elements were shown to establish the conspiracy and there were affirmative acts by Brown and Jordan to carry out its purpose.

Without referring to any specific instances, the appellant argues that the court erred in admitting post conspiracy acts and declarations of Jordan, and further that statements and acts of Jordan were admitted in evidence before there was any proof of the conspiracy. Jordan's testimony related to his dealings and conversations with Brown prior to making the offer to sell the amphetamine tablets. The purpose of this direct testimony was to prove the conspiracy and was admissible for that purpose. An examination of the record discloses no prejudicial error in the admission of evidence which was objected to by the appellant.

As one of the grounds for a new trial newly dis-

covered evidence is alleged. The evidence referred to is that while the jury was deliberating Taylor made the statement that Jordan had told him he intended to obtain the money in the possession of Taylor by robbery. In his cross examination Jordan so testified, but it appears that Jordan planned to take this action after it became known that the sale of the tablets could not be consummated and the identity of the officers was known. In any event, the so-called newly discovered evidence could be used only for the purpose of impeachment and therefore is not grounds for a new trial. 2 Wright, Fed. Pract. & Proc., § 557; United States v. Harris, 462 F.2d 1033 (10th Cir. 1972); King v. United States, 402 F.2d 289 (10th Cir. 1968).

Finally it is asserted that the trial court erred in failing to particularly instruct the jury at the time the evidence concerning post conspiracy was admitted that such evidence could not be used against defendant Brown.

At the conclusion of the instructions the attorney for Brown announced that he had no objection to the instructions as read and none were submitted to the court. Neither do we find any request for such instruction when evidence relating to Brown was admitted. We have previously said that the testimony of Jordan relating to his dealings with Brown was admissible. This includes the statement that on one occasion Brown gave him 10,000 tablets and 15,000 to another person. This evidence substantiated the theory that Brown was dealing with Jordan for the sale of tablets in large quantities, and disclosed a general scheme or plan. King v. United States, *supra*.

AFFIRMED.

APPENDIX B

JUDGMENT AND COMMITMENT (Rev. 2-68)
Cr. Form No. 25

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF OKLAHOMA

No. 74-CR-104

UNITED STATES OF AMERICA

v.

DONALD BROWN

On this 14th day of November, 1974 came the attorney for the government and the defendant appeared in person and with counsel, Larry Oliver,

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a verdict of guilty, has been convicted of the offense of having violated T.21, U.S.C., § 846, in that from on or about June 24 to July 24, 1974, at Tulsa, Oklahoma, in the Northern District of Oklahoma, the defendant and another person did willfully and knowingly combine, conspire, confederate and agree with other persons to distribute a Schedule III nonnarcotic controlled substance, Amphetamine, all as charged in the Indictment.

and the court having asked the defendant and counsel whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS, plus a fine in the amount of $15,000.00, to be paid within 90 days from this date.

IT IS FURTHER ADJUDGED that defendant is sentenced to a special parole term of two (2) years to commence at expiration of sentence imposed herein.

IT IS ADJUDGED that the execution of this sentence is deferred until 12:00 Noon, December 2, 1974.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Approved as to form:
s/s BEN F. BAKER
Ben F. Baker, Asst. U.S. Atty

s/s FRED DAUGHERTY
United States District Judge.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF OKLAHOMA

Case No. 74-CR-104

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

BOBBY JORDON and DONALD BROWN,
Defendants.

ORDER

Defendant Donald Brown was convicted on November 17, 1974 by a jury of conspiring to distribute a controlled substance in violation of the Drug Abuse and Control Laws of the United States. He has filed a Motion For A New Trial. His Motion is supported by a Brief. The Government has filed its Response in opposition to said Motion.

Defendant Brown sets out five grounds upon which he claims he is entitled to a new trial.

Ground 1 is without merit as shown by the Order of the Court entered herein this date in which said Defendant's renewed Motion For Judgment of Acquittal has been denied.

Ground 2 is without merit as the jury verdict is not contrary to the law and the weight of the evidence but the verdict is fully supported by the law and evidence.

Ground 3 is without merit as the jury verdict is supported by substantial evidence.

As to Ground 4 the Defendant's attorney states that new evidence has been discovered in that after the evidence in the case was closed and while the jury was

deliberating a witness for the prosecution, a local narcotics enforcement officer, advised Defendant's counsel that the co-defendant, Bobby Jordon, who testified for the prosecution, had made statements to the officer to the effect that he never intended to sell any drugs, but that he intended the whole transaction involved in the conspiracy to be a "rip off" or a theft of the purchaser's money. He contends that such statements allegedly made to the local officer by Jordon are inconsistent with said witness's testimony at the time of the trial. The Government's Response to the proposition raised as to this "newly discovered evidence" is that the purported evidence is merely cumulative or impeaching. It also urges that newly discovered evidence must be such that it would produce an acquittal in a new trial and that the evidence involved herein would not produce such result. The standards for considering a Motion for a New Trial based on newly discovered evidence are set out in *Wright, Federal Practice & Procedure:* § 557, p. 515 as follows:

> "Accordingly rather exacting standards have been developed by the courts for motions of this kind. A motion based on newly discovered evidence must disclose (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant."

In considering such standards in the case at bar, it appears that the evidence purportedly newly discovered would be merely impeaching. It would be for the purpose of impeaching the testimony of the co-defendant by

tending to show that he had previously made statements to a local narcotics enforcement officer which were inconsistent with the witness's testimony at the time of the trial. At the trial such witness said he arranged a sale of amphetamines and a sale was to be effected; that Defendant Brown was his supplier for the sale; that he and Defendant Brown drove to the place where the sale was arranged for the purpose of consummating the same; that Defendant Brown left when he said the buyers were "narcs"; that some time thereafter and at a different location the witness testified he decided for the first time to get the officers' money but not before. Thus, the purported newly discovered evidence would be impeaching of this witness' testimony at the trial. Further, the Court finds that the purported evidence will not probably produce an acquittal of Defendant Brown.

Ground 5 appears to be the same as set out in Ground 1, *supra,* and for the same reason set out above regarding Ground 1, *supra,* is without merit.

Defendant Brown's Motion For A New Trial is denied in all respects.

It is so ordered this 16 day of December, 1974.

s/s FRED DAUGHERTY
Fred Daugherty
United States District Judge

CERTIFICATE OF MAILING

I, Andrew T. Dalton, Jr., a member of the Bar of the United States Supreme Court, certify that a true and correct copy of the foregoing was mailed, postage prepaid, to Nathan G. Graham, U.S. Attorney, 460 U.S. Courthouse, Tulsa, OK 74103, this 21 day of November, 1975.

ANDREW T. DALTON, JR.